

WINTER 2015

by **Marco P. Falco**

Director of Legal Research / Research and  
Opinions Lawyer at Torkin Manes LLP



## PRACTICE AREA LINKS

[Construction Law](#)

[Employment & Labour](#)

[Family Law](#)

[Health Law](#)

[Insolvency & Restructuring](#)

[Insurance Defence](#)

[Litigation](#)

[Medical Malpractice](#)

[Personal Injury](#)

[Wills, Trusts & Estates](#)

### **Marco P. Falco**

As Director of Legal Research at Torkin Manes, Marco provides legal opinions and analyses on a range of topics in the civil litigation and corporate/commercial context. He has drafted legal memoranda, facta and materials for all levels of court, with a particular emphasis on appellate cases.

## Talk to an Expert: The Preparation and Use of Expert Reports in Litigation

THE ONTARIO COURT OF APPEAL HAS ESTABLISHED THE RULES GOVERNING WHAT IS AND WHAT IS NOT APPROPRIATE IN THE PREPARATION AND USE OF EXPERT REPORTS IN LITIGATION.

In the much-anticipated decision, *Moore v. Getahun*, 2015 ONCA 55, per Sharpe J.A., the Court has affirmed key principles regarding the preparation and use of expert reports under Rule 53.03 of the *Rules of Civil Procedure*. They can be summarized as follows:

- (i) the well-established practice of lawyers meeting with expert witnesses to review draft reports is acceptable, so long as the report reflects the expert's genuine and unbiased opinion;
- (ii) preparatory discussions and drafts of expert reports are not subject to automatic disclosure in litigation; a party seeking draft reports or notes of the expert must show that there are reasonable grounds to suspect that counsel communicated with

the expert in an improper way, likely to interfere with the expert's duties of independence and objectivity to the Court; and

- (iii) written expert reports that are not entered as exhibits in evidence and on which there was no cross-examination cannot be used by the trier-of-fact to discredit or contradict the expert's *viva voce* evidence given at trial.

*Moore v. Getahun* involved a medical malpractice action. The plaintiff, who was involved in a motorcycle accident, was treated by the defendant orthopaedic surgeon for a fracture to his right wrist. The defendant applied a full circumferential cast to the plaintiff's wrist and forearm. The plaintiff suffered permanent damage to his arm due to "compartment

syndrome”.

He commenced an action against the defendant claiming that the compartment syndrome in his arm was caused by the defendant’s negligence in the application of a full cast. The chief issues at trial were whether the defendant breached the standard of care by applying a full circumferential cast on the plaintiff’s wrist and whether the cast caused the plaintiff’s compartment syndrome. Ultimately, the trial judge allowed the plaintiff’s action and held that the defendant was negligent in using a full circumferential cast and that his negligence caused the plaintiff damages.

On appeal, the Court of Appeal held that the trial judge made certain errors in her evidentiary rulings, as set out below, but that none of these errors rendered the trial unfair or caused a substantial wrong. Accordingly, the appeal was dismissed.

At trial, a number of issues arose concerning the admissibility of various aspects of the expert evidence. The trial judge relied on Rule 53.03 and the duty of impartiality owed by experts to the Court. On appeal, the defendant challenged certain of these evidentiary rulings, as follows:

1. **The trial judge erred by criticizing the defendant’s counsel for discussing the content of their expert’s draft report with their expert witness.**

In her reasons for decision, the trial judge was troubled by the suggestion that the defendant’s expert had reviewed his draft report with the defendant’s counsel. The issue arose as a result of the cross-examination of the expert at trial. The trial judge held that the meeting that took place between defence counsel and their expert “involved more than simply superficial, cosmetic changes” to the expert’s draft report. Moreover, the trial judge held that the practice of counsel and experts discussing the expert’s draft report was improper because it violated the expert’s neutrality. Thus, the trial judge reached two conclusions: (i) the practice of counsel reviewing draft reports during litigation had to stop; and (ii) counsel had to fully disclose in writing all changes to an expert’s final report which came about as a result of the lawyer’s corrections, suggestions or clarifications. In the trial judge’s view, these measures would ensure the expert witness’ objectivity and provide transparency to the Court.

The Court of Appeal reversed the trial judge’s ruling. First, the Court held that there was nothing in the record to suggest that either counsel or the expert did anything improper or that the expert’s report reflected anything other than his unbiased opinion. Second, the Court upheld the validity of the long-standing practice of counsel reviewing draft expert reports. The Court was not concerned that the independence and objectivity of an expert would

be tainted by this practice, as there are a number of safeguards in place to ensure counsel does not inappropriately influence the expert’s opinion as reflected in the expert’s report.

They include: (i) the ethical and professional standards applicable to the legal profession; (ii) the ethical standards of the expert’s professional bodies which place an obligation on the expert to be independent and impartial; and (iii) the nature of litigation was such that, through cross-examination, the fact that counsel may have improperly influenced an expert witness could be exposed at trial.

The Court therefore held that communications between counsel and the expert were a necessary part of the preparation for trial:

Consultation and collaboration between counsel and expert witnesses is essential to ensure that the expert witness understands the duties reflected [in the *Rules of Civil Procedure*]. Reviewing a draft report enables counsel to ensure that the report (i) complies with the *Rules of Civil Procedure* and the rules of evidence, (ii) addresses and is restricted to the relevant issues and (iii) is written in a manner and style that is accessible and comprehensible.

2. **Preparatory discussions and drafts between counsel and the expert are not subject to automatic disclosure.**

The Court of Appeal rejected the trial judge’s ruling that there should be full disclosure in writing of any

changes to an expert's final report as a result of counsel's corrections, suggestions or clarifications. First, the Court held that such consultations were protected by litigation privilege, i.e. the privilege which protects communications with third parties where the dominant purpose of such communication is the preparation for litigation:

Pursuant to rule 31.06(3), the draft reports of experts the party does not intend to call are privileged and need not be disclosed. Under the protection of litigation privilege, the same holds for the draft reports, notes, and records of any consultations between experts and counsel, even where the party intends to call the expert as a witness.

The Court further held that if preparatory discussions and drafts were subject to automatic disclosure, this would impose a chill on the careful preparation of expert reports. It would certainly "discourage the participants from reducing preliminary or tentative views in writing".

The Court noted that its ruling did not detract from the fact that the privilege surrounding expert reports was always qualified. First, under Rule 31.06(3), a party must disclose the opinion of the expert witness before trial if he or she intends to call the witness at trial. This allows the opposite party on discovery to obtain disclosure of the "findings opinions and conclusions of an expert engaged by or on behalf of the party being examined". Moreover, under Rule 53.03(2.1), the

party calling the expert at trial also has to disclose the "foundational information" for the expert's opinion and the expert reports. Third, any litigation privilege attaching to an expert report will yield to "meet the ends of justice", i.e. where a party relies on litigation privilege to mask improper conduct, such as counsel's attempt to interfere with the expert's objectivity. If a party can show there are reasonable grounds to suspect counsel improperly influenced an expert, the Court can always order disclosure of these discussions.

Thus, absent a factual foundation to support a reasonable suspicion that counsel improperly influenced the expert's objectivity, a party is not permitted to demand production of draft reports or notes of interactions between counsel and the expert.

### **3. The trial judge erred by relying on expert reports not entered as exhibits to discredit the *viva voce* evidence of the expert witnesses.**

The last important error identified by the Court of Appeal was that, where there was a conflict between the expert's evidence at trial and the contents of the expert's report, the trial judge admitted the contents of the expert's report (which was not entered into an exhibit at trial, but simply provided to the judge as an *aide memoire*) to assess the reliability and credibility of the expert's opinion. That is, despite the trial judge's insistence, counsel refused to enter certain expert reports as exhibits, but provided them to the

judge simply as an *aide memoire*. The trial judge then used these reports to assess the credibility of the expert.

The Court of Appeal held that if the expert witness was not cross-examined as to an inconsistency between the expert's *viva voce* evidence at trial and the contents of their report, the trial judge erred in placing any weight on this inconsistency to assess the expert's credibility. Trial fairness requires that an expert witness should be challenged on cross-examination with what appears to be contradictions in his or her report, so that the expert has an opportunity to respond. The Court held:

It follows that the trial judge erred to the extent that she relied on perceived contradictions between the experts' oral evidence and their reports, as the alleged contradictions were not put to the experts in cross-examination and the reports were not exhibits.

The Court of Appeal's decision in *Moore v. Getahun* has established the foundation for how expert testimony is to be created and used in litigation. In establishing the rules governing expert evidence at trial, the Court sought to strike a balance between the freedom of counsel and experts to collaborate in the preparation of an expert opinion and the necessary duty of impartiality the expert owes to the trier-of-fact.